IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL NO.9/98

In the matter between:

NIGEL FENWICK APPELLANT

AND

IMPERIAL CAR RENTAL (PTY) LTD RESPONDENT

CORAM : R.N. LEON J A

: J.H. STEYN J A

: P.H. TEBBUTT J A

FOR THE APPELLANT : Mr duselh

FOR THE RESPONDENT :

JUDGEMENT

Tebbutt J A:

This appeal involves the interpretation of a written rental agreement under which a car was hired by the signatory to the agreement for use by another party, in order to determine the liability of such signatory to the lessor, a car rental company.

In the High Court, the latter company, which is the respondent in this appeal, was awarded judgement against the appellant for payment of the sum of E28091,00, together with interest and costs on the attorney and client scale.

It is against that judgement that the appellant brings this appeal.

The facts are the following:

An acquaintance of the appellant, one Leroy Rollins, on 5th April 1994 requested the respondent to hire him a motor vehicle viz a Toyota Corolla car. Rollins did not have a



credit card acceptable to the respondent in order to pay for the hire of the car. He later returned with the appellant who tendered his credit card, which the respondent was willing to accept. The appellant thereupon agreed to enter into a rental agreement with the respondent for the car required by Rollins. He signed a standard written agreement form used by the respondent. On the face of the form the appellant is described as the "Renter" while Rollin's name is included as an "additional driver." In terms of the agreement, the rented vehicle was to be returned to the respondent on 15th April 1994. It is common cause that Rollins took possession of the vehicle immediately after the agreement was signed and appellant had no further dealings with the

vehicle.

It is further common cause that the original rented vehicle developed some problem and another vehicle was substituted for it on 16th April 1994, the rental period having been extended by Rollins first from 15 to 19 April 1994 and then from 19 to 30 April 1994. Rollins did not return the vehicle to respondent and when it was eventually recovered by respondent on 2nd May 1994 it was found to have been damaged, following a collision. It is also common cause that appellant had no knowledge of the extensions of the rental period or of the substitution of the second vehicle for the one originally hired.

Respondent's case in the court a quo was that in breach of the agreement appellant had failed to return the vehicle in a good and roadworthy condition and proper running order and was liable to respondent in damages which it computed in the sum of E28091.00. The agreement also provided that any costs for which appellant was liable in the event of a breach of the agreement would be on the attorney and client scale.

In his defence to that case, appellant's contentions were that he was only liable to the respondent for the rental period signed for by him viz 5 to 15 April 1994 in respect of the original rented car. He contended that Rollins had no authority (a) to change the original rented vehicle for another or (b) to have the rental period extended without his consent.



The learned trial Judge quite correctly stated that the validity of these contentions turned on the interpretation of certain clauses of the written agreement.

In terms of the agreement the "Renter" of the vehicle is defined to mean: -

"Jointly and severally the signatory hereto, the person on whose behalf the signatory signs this agreement or takes delivery of the vehicle, the BILLING PARTY (unless he is the holder of a CARD) and the authorised user in terms of a card, the signatory warranting that he is authorised to sign this agreement on behalf of all these parties."

Disregarding those parties mentioned in the definition of "Renter" who have no relevance to his appeal, the definition of "Renter" accordingly means simply: -

"Jointly and severally the signatory hereto (and) the BILLING PARTY, the signatory warranting that he is authorised to sign this agreement on behalf of (the BILLING PARTY)."

The face of the agreement is divided into a number of small numbered blocks into which relevant details can be inserted. The names of the driver and of additional drivers can be inserted in Blocks 1,7,74 and 75.

The "BILLING PARTY" is defined as meaning-

"The person mentioned in Block 1,7,74 or 75"

The name of Rollins appears in Block 75.

The "Vehicle" is defined, as far as is relevant to this appeal, as meaning: -

"The motor vehicle referred to in Block 42, 43 and 44 or any vehicle which may be substituted therefore during the Rental Period or Extended Period...."

After referring to the above quoted definitions the learned Judge a quo found as follows:

"It is clear from this definition that the "Renter" of a vehicle includes all the persons listed as drivers and additional drivers of the rented vehicle. This definition places a person who is listed as a driver or as an additional driver on the same footing as the person who signs for the rental of the vehicle. Such a driver can in the circumstances, for example, approach plaintiff for an extension of the rental period

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or for purposes of changing the rented vehicle. Neither the definition clauses, nor the main clauses of the agreement make provision for the consent of the signatory to the agreement first being obtained for any variation of the agreement regarding the rental period or a change of vehicles.

A highly attractive argument was advanced on behalf of the defendant to the effect that the defendant should, as one of the contracting parties, have sanctioned the variations of the contract which were effected at the instance of Mr. Rollins. It was submitted that the plaintiff and the defendant entered into a specific contract for a specific rental period and that the defendant was not liable for any breach occurring after that period. Unfortunately for the defendant, this argument must give way to the clear wording and effect of the definition of a "Renter" of a vehicle. Immediately upon signing of the agreement, Mr. Rollins became vested with the same powers as the defendant in relation to the agreement. It was defendant's duty to read and familiarise himself with the terms and conditions of the agreement before signing it and not merely to assume that his consent was required for any variation of the agreement."

He therefore granted judgement in favour of respondent as set out above.

In his argument in this Court, Mr. Dunseith for the appellant submitted that the learned Judge had erred in those findings. The definition of "Renter" did not mean that the appellant conferred authority on the Billing Party, Rollins, to vary the original rental agreement on his behalf nor could any such mandate be found in or be inferred from any other terms of the agreement. As a principal party to the agreement, Rollins had the power to vary the agreement by substituting another vehicle or extending the rental period but such variations could only be binding upon himself and, so Mr. Dunseith argued, not on the appellant in the absence of any express or implied authority from the appellant. It was common cause that appellant had not agreed to any variation of the agreement, nor had he authorised Rollins to vary it. The joint and several liability referred to in the definition of "Renter" meant no more than the common law meaning of that concept which was the liability of each co-contractor to make full performance himself of the obligations under the principal contract and did not confer a mandate on one of the co-contractors to act as agent for the other in varying the principal contract. Appellant was therefore, so the submission went, not liable for any amount incurred subsequent to 15th April 1994 or in respect of the substituted vehicle, any extension of the rental period or substitution for the original vehicle being a variation of the agreement.

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These submissions are, in my view, flawed in several respects.

In the first place, I agree with the learned trial Judge that while Mr. Dunseith's argument as to the common law position of co-contractors may be correct, it must give way to the clear and explicit terms of the agreement into which the appellant entered and to the clear and unambiguous wording and effect of the definitions contained therein.

Secondly, the substitution of another vehicle for the original rental one did not, in my opinion, constitute a variation of the agreement. The definition of "vehicle" set out above viz that it means the vehicle referred to or described in the agreement "or any vehicle substituted therefor"contemplates that there may be substituted during the Rental Period or Extended Period for the original vehicle, which was referred to and described in Block 42, 43 and 44, another vehicle. The substituted vehicle is therefore still "the vehicle" that was the subject of the lease between Lessor and the "Renter" in terms of clause 2.1 of the lease agreement which states that "the Lessor lets and the Renter hires the vehicle for the Rental Period."

More fundamental to the issue in this case, however, is the effect of some of the other clauses in the agreement. Clause 2 sets out the rights and obligations of the parties to the agreement, the parties being the Lessor on the one hand and the Renter on the other, including the amounts payable by the "Renter" to the Lessor. Clause 2.7 provides that:-

"The LESSOR may recover from the RENTER any amounts provided for in this Clause 2 for any EXTENDED PERIOD, without prejudice to any claim for DAMAGES or other rights it may have."

"EXTENDED PERIOD" is defined as far as is relevant hereto as follows: "EXTENDED PERIOD means any period extending beyond the date in Block 20 or 24 for which the vehicle is not redelivered to the LESSOR, for whatever reason and includes the period up to and including, in the case of COLLISION DAMAGE, the date of repair of such damage; in the case of TOTAL LOSS, the date on which it is declared to be such..."



Blocks 20 and 24 set out any periods for which the rental period is extended, in casu from 15 to 19 April 1994 and then from 19 to 30 April 1994.

The obligations of the Renter to pay the amounts which the Renter is liable to pay therefore extend not only to any agreed extended period as set out in Blocks 20 and 24, but go also beyond that period and until the vehicle is returned to the Lessor i.e. to the respondent.

The agreement also contemplates an extension of the rental period. Section 6.5 of the agreement deals with a variation of the agreement providing that such variation is not of any force and effect unless in writing and signed by the parties i.e. the Lessor (the respondent) and the Renter. Clause 6.5 in relation to an extension of the rental period reads as follows:

"... provided that it shall be competent and valid for the parties to agree orally to an extension of the period of the contract, but whether the parties so agree or not, the obligations of the RENTER shall continue until the VEHICLE has been returned to the LESSOR and the RENTER shall remain liable to pay the charges specified herein accordingly."

The agreement therefore provides, in clear and unequivocal terms, that whether the rental period is extended by agreement or not, the Renter's obligations to pay the charges specified in the agreement continue until the vehicle is returned to the lessor/respondent and, in terms of Clause 2.7, even beyond any such agreed extension and until the vehicle is returned to the respondent.

The Renter is in the first instance the appellant, as signatory to the agreement, and secondly, Rollins as the Billing Party. Their liability is joint and several. Until the vehicle was returned to the respondent as lessor, therefore, the appellant was jointly and severally liable with Rollins to pay the charges specified in the agreement and also any collision damages or damages as a result of the total loss of the vehicle.

It was therefore immaterial, and mattered not one iota, whether Rollins extended the rental period with appellant's consent or not. As a "Renter" as defined, appellant was liable in terms of the agreement jointly and severally for all charges and any damages until the vehicle was returned to the respondent lessor.

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The learned Judge a quo was therefore correct in his determination of the appellant's liability to the respondent and in giving judgement against appellant and in favour of the respondent in the amount claimed and on the question of costs. Neither the latter nor the amount claimed was contested in the Court a quo nor challenged in this Court.

It follows that the appeal must fail.

The appeal is therefore dismissed with costs on the attorney and own client scale as provided for in the Agreement and the order of the court a quo is confirmed.

P.H. TEBBUTT J A

I AGREE:

R.N. LEON J A

I AGREE:

J. H. STEYN J A

Delivered in open Court on this 2nd day of October 1998

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